



DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 225

[Docket DARS-2021-0016]

RIN 0750-AL37

Defense Federal Acquisition Regulation Supplement; Use of Firm-Fixed-Price Contracts for Foreign Military Sales (DFARS Case 2021-D019)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2021 that rescinds the requirement for the use of firm-fixed-price contract types for foreign military sales unless an exception or waiver applies.

DATES: Effective [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

FOR FURTHER INFORMATION CONTACT: Kimberly Bass, telephone 703-372-6174.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is issuing a final rule amending the DFARS to implement section 888 of the National Defense Authorization Act (NDAA) for

Fiscal Year (FY) 2021 (Pub. L. 116-283), which repeals section 830 of the NDAA for FY 2017 (Pub. L. 114-328). DoD published a proposed rule in the **Federal Register** at 84 FR 12179 on April 1, 2019, to implement sections 829 and 830 of the NDAA for FY 2017 (Pub. L. 114-328). On May 29, 2019, a document was published in the **Federal Register** at 84 FR 24734 to extend the comment period for 14 days until June 14, 2019. The final rule implementing section 830 was published in the **Federal Register** at 84 FR 65304, on November 27, 2019.

Section 830 was implemented at DFARS 225.7301-1, Requirement to Use Firm-Fixed-Price Contracts, and required the use of firm-fixed-price contracts for foreign military sales (FMS), unless one of the exceptions or the waiver provided in the statute applied.

Section 807 of the NDAA for FY 2020 (Pub. L. 116-92) delayed the effective date of regulations implementing section 830 until December 31, 2020.

Section 888 of the NDAA for FY 2021 repealed section 830 of the NDAA for FY 2017 and the requirement for contracting officers to use firm-fixed-price contracts for FMS unless an exception or a waiver applies. Accordingly, DFARS section 225.7301-1 is being removed and reserved.

II. Publication of This Final Rule for Public Comment is Not Required by Statute

The statute that applies to the publication of the Federal Acquisition Regulation (FAR) is the Office of Federal

Procurement Policy statute (codified at title 41 of the United States Code). Specifically, 41 U.S.C. 1707(a)(1) requires that a procurement policy, regulation, procedure, or form (including an amendment or modification thereof) must be published for public comment if it relates to the expenditure of appropriated funds and has either a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure, or form, or has a significant cost or administrative impact on contractors or offerors. This final rule is not required to be published for public comment, because DoD is not issuing a new regulation; rather, this rule is updating internal operating procedures that will no longer require contracting officers to use firm-fixed-price contracts for FMS as directed at DFARS 225.7301-1(a). In addition, the waiver at DFARS 225.7301-1(b) will no longer be required.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule does not create any new DFARS solicitation provisions or contract clauses. It does not impact any existing solicitation provisions or contract clauses or their applicability to contracts valued at or below the simplified acquisition threshold or for commercial items, including commercially available off-the-shelf items.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

V. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801-808) before an interim or final rule takes effect, DoD will submit a copy of the final rule with the form, Submission of Federal Rules under the Congressional Review Act, to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the **Federal Register**. The Office of Information and Regulatory Affairs has determined that this rule is not a major rule as defined by 5 U.S.C. 804.

VI. Regulatory Flexibility Act

The Regulatory Flexibility Act does not apply to this rule because this final rule does not constitute a significant DFARS

revision within the meaning of FAR 1.501-1, and 41 U.S.C. 1707 does not require publication for public comment.

VII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Part 225

Government procurement.

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

Therefore, 48 CFR part 225 is amended as follows:

PART 225—FOREIGN ACQUISITION

1. The authority citation for 48 CFR part 225 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

225.7301-1 [Removed and Reserved]

2. Remove and reserve section 225.7301-1.